

DATO' NG TIAN SANG

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v.

TOH PEE YOK & ORS

HIGH COURT MALAYA, JOHOR BAHRU

b

SYED AHMAD HELMY JC

[ORIGINATING PETITION NO: (MT-1) 26-3-2001]

31 JULY 2002

COMPANY LAW: *Winding-up - Petition - Striking out - Application to strike out petition under O. 14A r. 1(1) Rules of the High Court 1980 - Whether petitioner had locus standi - Whether petition an abuse of process of court*

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COMPANY LAW: *Winding-up - Locus standi - Proposed removal of petitioner as advisor - Whether petitioner had locus standi to file petition*

d

COMPANY LAW: *Winding-up - Just and equitable rule - Oppression - Whether petitioner affected in his capacity as member - Companies Act 1965, s. 181*

COMPANY LAW: *Winding-up - Opposition to petition - Whether petition filed for collateral purpose of benefiting third parties - Whether respondent's objections fell within ambit of O. 14A Rules of the High Court 1980*

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This was an application by the petitioner ('encl. 5') seeking the following interlocutory reliefs pending the hearing of a petition filed under s. 181 of the Companies Act 1965 ('CA'): (1) an injunction restraining the 1st to 4th respondents ('the respondents') from removing the petitioner, or to implement any resolution to remove the petitioner, as advisor to Toweltech Bhd ('Toweltech'), or excluding the petitioner or his family from being represented at board meetings of Toweltech; (2(a)) an injunction restraining the respondents from voting 3,740,000 Toweltech shares at any shareholders meeting of Toweltech; or in the alternative (2(b)) an order directing the respondents to appoint the petitioner as proxy to attend and vote 1,430,000 shares ('the petitioner's entitlement') as the petitioner deems fit at any shareholders meeting at Toweltech. The respondents, in its preliminary objections, invoked O. 14A r. 1(1) of the Rules of the High Court 1980 ('RHC') to strike out and/or dismiss the petition on two grounds: (i) that the petitioner had no *locus standi* since the petitioner's allegation of legitimate expectation to remain as an advisor and to participate in the

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- a* management thereof related to the affairs of Toweltech who were not parties to the winding-up petition; and (ii) the petition was initiated for a collateral purpose *ie*, the benefit of the petitioner's family who were not parties to the action, and hence was an abuse of the court's process.
- b* The 5th and 6th respondents ('DV' and 'DG' respectively) were incorporated by the petitioner; DV in terms held 100% equity in DG which in turn held 40% equity in Toweltech. Thus, all form of returns to the investments of the shareholders in DV was entirely dependant on the business and operations of Toweltech. The petitioner, a director of both DV and DG, was an advisor to Toweltech and had been attending all board meetings of Toweltech since 1995. However, due to a dispute between the parties, the respondents, who were also directors of DV and DG, proposed to pass a resolution to remove the petitioner as advisor to Toweltech resulting in the petitioner filing encl. 5. The basis of the petition was founded on the quasi-partnership relationship between the petitioner and the other shareholders,
- c* in particular the respondents, of DV, which resulted in the understanding that the petitioner had a legitimate expectation to participate in the management of DV's business, which is the operations of Toweltech as its advisor, and that the votes of the 40% shareholding held ultimately by DV was to be decided by way of a consensus and in any event not to be used against the petitioner's interest.
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Held:

- f* [1] The proposed removal of the petitioner as advisor was a breach of the understanding and legitimate expectation that the petitioner, as a member of DV, was entitled to participate in the management of DV's business. In this particular case, it was not in dispute that DV's business was the operations of Toweltech of which 40% of its equity was held through DV's wholly-owned subsidiary DG, and neither DV nor DG had any other business. Thus, the only practical meaning to the legitimate expectation of participating in the business of DV must be that the petitioner was allowed to participate in the board meetings of Toweltech. The respondents' act of excluding the petitioner from attending the board meetings of Toweltech was an act that went towards determining the question of breach of the legitimate expectation of the petitioner as a member of DV. The respondents' act of removing the petitioner was an act as directors of DV and DG, and not as directors of Toweltech; therefore, the petitioner, being a shareholder, definitely had a standing to file the petition. (pp 161 g-h, 162 a-b & 163 b)
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[2] Although it is trite that a complaint for oppression must refer to acts affecting the person in his capacity as a member, the principle could, nevertheless, be interpreted more broadly. The English courts have been prepared to accept wider equitable considerations as legitimate expectations for which a member is recognised to be affected in his capacity as a member. Since s. 181 of the CA is wider than the equivalent section in England, the broader approach would be applicable in this instance. (pp 163 f & 165 d-e)

[3] On the facts, the petition was not filed for the collateral purpose of benefiting any third parties as alleged but to secure remedies for wrongs done to the petitioner himself. In any event, the respondents' objections on this point would fail as it involved a question of fact, not law, and thus could not fall within the ambit of O. 14A of the RHC since the facts pertaining to the allegation of collateral purpose had not been admitted but disputed by the petitioner. (p 166 c-e)

[Respondents' preliminary objections dismissed; hearing of encl. 5 to proceed.]

Case(s) referred to:

Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423 (*refd*)
Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd [1986] 1 CLJ 493; [1986] 1 CLJ (Rep) 279 HC (*refd*)
Cheng Hang Gun v. Perumahan Farlim (Penang) Sdn Bhd [1993] 3 MLJ 352 (*refd*)
Federal Insurance Company v. Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 (*refd*)
Hayes v. Bristol Plant Hire Ltd [1957] 1 All ER 685 (*refd*)
Hotel Jayapuri Bhd v. National Union of Hotel Bar & Restaurant Workers [1980] 1 MLJ 109 (*refd*)
HR Harmer Ltd [1958] 3 All ER 689 (*refd*)
Jaya Medical Consultants Bhd v. Island & Peninsular Bhd [1994] 1 MLJ 520 HC (*refd*)
Kok Fook Sang v. Juta Vila (M) Sdn Bhd [1997] 2 CLJ 116 CA (*refd*)
Morgan v. 45 Flers Avenue P/L [1986] 10 ACLR 692 (*refd*)
Re Haden Bill Electrical Ltd [1995] 2 BCLC 280 (*fol*)
Re a company [1986] BCLC 376 (*refd*)
Re HR Harmer Ltd [1958] 2 All ER 689 (*refd*)
Re Kong Thai Sawmills (Miri) Sdn Bhd [1978] 2 MLJ 227 (*fol*)
Re Noble & Sons (Clothing) Ltd [1983] BCLC 273 (*fol*)
Re Ringtower Holdings plc [1989] 5 BCC 82 (*fol*)
Tan Guan Eng v. Ng Kweng Hee [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC (*refd*)

- a** *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC (*refd*)
Tengku Abdullah Ibni Sultan Abu Bakar v. Mohamad Latiff Shah Mohd [1997] 2 CLJ 607 CA (*refd*)
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd [1996] 1 CLJ 393 CA (*refd*)
Verghese Mathai v. Telok Plantation Sdn Bhd [1988] 3 MLJ 216 HC (*refd*)
- b** *Yai Yen Hon v. Lim Mong Sam* [1997] 2 CLJ 812 CA (*refd*)

Legislation referred to:

Companies Act 1965, ss. 147(3), 181
 Rules of the High Court 1980, O. 14A r. 1(1)

- c** Companies Act 1948 [UK], s. 210
 Companies Act 1985 [UK], s. 459

Other source(s) referred to:

Malaysian High Court Practice, vol 1, para 14A.1.3

- d** *For the petitioner - William Leong Jee Keen (CH Yau); M/s William Leong & Co*
For the respondents - Lim Hock Siang (Lim Choon Khim); M/s Presgrave & Matthews

Reported by Suresh Nathan

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JUDGMENT**Syed Ahmad Helmy JC:**

The petitioner by way of summons-in-chambers in encl. 5 seeks the following interlocutory reliefs pending the hearing of the petition filed under s. 181 of the Companies Act 1965:

- f**
1. an injunction restraining the 1st to 4th respondents ("the said respondents") from removing the petitioner or to implement any resolution to remove the petitioner as advisor to Toweltech Berhad ("Toweltech") or excluding the petitioner or his family from being represented at Board Meetings of Toweltech;
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- 2(a) an injunction restraining the respondents from voting 3,740,000 Toweltech shares at any shareholders meeting of Toweltech or in the alternative;
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- 2(b) an order directing the respondents to appoint petitioner as proxy to attend and vote 1,430,000 shares ("the petitioner's entitlement") as the petitioner deems fit at shareholders meeting of Toweltech;
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3. costs;
 4. such further and other relief.

In support of the application the petitioner has filed 6 affidavits and the respondent 3 affidavits in opposition. The parties have also filed in three written submissions each in respect of the application.

The respondents have invoked O. 14A r. 1(1) of the Rules of the High Court 1980 to strike out and/or dismiss the petition on two grounds namely the petitioner has no *locus standi* and secondly the petition was initiated for a collateral purpose and hence an abuse of the court's process.

As the determination of the preliminary issues of *locus standi* and collateral purpose would have the effect of determining the fate of the petition in toto it is only appropriate to lay out the background history and the material facts as borne out by the petition and the several affidavits filed herein.

The 5th and 6th respondents (hereinafter called "DV" and "DG" respectively) were incorporated by the petitioner. DV has seven shareholders comprising of the petitioner who holds 36.2%, petitioner's wife with 2.04%, Mustapha Buang with 5.99%, the 1st respondent with 14.68%, 2nd respondent with 8.99%, 3rd respondent with 8.99% and the 4th respondent with 23.11%. DV in term holds 100% of the equity in DG and DG holds 40% equity in Toweltech Berhad (hereinafter called "Toweltech") the other shareholders being the petitioner's son owning 25%, the Koh family owning 20% and the 1st, 2nd, 3rd & 4th respondents owning 15%. Aside from the equity held in Toweltech neither DV or DG conducts any other business as all the business and operations are carried out by Toweltech. Thus all forms of returns to the investments of the shareholders in DV is entirely dependent on the business and operations of Toweltech.

There are six directors in DV namely the petitioner, his wife and the 1st, 2nd, 3rd and 4th respondents. There are 5 directors in DG, the petitioner and the 1st, 2nd, 3rd and 4th respondents. The petitioner is also an advisor to Toweltech having been appointed on 7 January 1996. The petitioner has since 1995 been attending to all the board meetings of Toweltech and is also one of the compulsory signatories without any limit on Toweltech's bank accounts.

The dispute between the parties can be traced from a board meeting of Toweltech held on 11 January 2001 where the petitioner and Koh Pee Seng rejected the demand by the 1st respondent for an increment of 5% in salary and for eight months bonus for the year 2000. Instead the Toweltech board approved a bonus for four months and an increment of 5%. The 1st respondent also demanded that the company buy him a Jaguar car costing about RM490,000. The petitioner and Koh Pee Seng did not agree because

- a* Toweltech was still operating with an accumulated loss of RM7,082,409. Outstanding claims by unionised employees for bonuses and increment amounting to RM300,000. An outstanding suit by a creditor for RM4 million and the outstanding interest free shareholders loan of RM2 million;
- b* In February 2001, the respondents issued circular board resolutions of DV:
- (i) to remove the petitioner as DV's corporate representative to DG under s. 147(3) of the Act and to replace him with the 2nd and 3rd respondents;
 - (ii) to appoint the 3rd respondent and 4th respondent as DG's corporate representative to Toweltech;
 - (iii) to authorise the 3rd and 4th respondents to sign resolutions on behalf of DG at meetings of Toweltech to remove Koh Pee Seng as; Director and Chairman of Toweltech and the petitioner as advisor.
- d* At the EGM held on 14 March 2001, Koh Pee Seng in his capacity as chairman of Toweltech upheld the petitioner's objections that the circular resolution appointing the representatives of DG to vote were invalid and the resolution to remove Koh Pee Seng as director and chairman and the petitioner as an advisor were defeated;
- e* On 9 May 2001, the respondents convened a fresh board meeting of DV and DG and approved resolutions authorising DG at the forthcoming EGM of Toweltech to vote in favour of resolutions to remove Koh Pee Seng as chairman and director and the petitioner as advisor.
- f* On 30 May 2001, the petitioner received a notice that a board meeting of Toweltech would be held on 7 June 2001 to discuss among others the inclusion of an additional agenda at an EGM of Toweltech to be held on 11 June 2001, a resolution to the effect that Koh Pee Seng be removed as director and chairman of Toweltech and the petitioner as advisor;
- g* The petitioner immediately filed the application for injunctive reliefs as per encl. 5 and the EGM have been postponed pending the hearing of this application.
- h* The basis of the petition as contended by the petitioner is founded on the quasi-partnership relationship amongst the petitioner and the other shareholders of DV in particular the said respondents. By reason of this quasi-partnership, there is an understanding and the Petitioner has a legitimate expectation to participate in the management of DV's businesses
- i*

which is the operations of Toweltech as its advisor and that the votes of the 40% shareholding held ultimately by DV is to be decided by way of a consensus and in any event not to be used against the petitioner's interest. The petitioner contends that he had as a member of DG (before all the DG shareholders exchanged their DG shares for DV shares) agreed to the investment in Toweltech based on this understanding and legitimate expectations. It is also based upon these understanding and legitimate expectations that he caused his son to take up directly 25% of the shares in Toweltech and for a RM2 million interest free loan to be given to Toweltech, for which his contribution and his wife as members of DV and by his son as a shareholder of Toweltech amounts to RM805,920. This it is submitted is the largest single contribution to the interest free loan by any single party. The petitioner contends that the conduct of the said respondents to approve a resolution directing DG to vote the 40% shares at the proposed Toweltech EGM for his removal as advisor violates these legitimate expectations as the moneys were invested and loans given on the basis that he will be able to look after the investments by participating in the management and that he would not have agreed to participate in this investment if he was not allowed to do so. It was not the agreement and understanding that the said respondents are to manage his investments and operate the business to his exclusion. For these reasons, the petitioner says that the actions and conduct of the said respondents are unfairly prejudicial to the petitioner or is otherwise oppressive or unfairly discriminates against him as a member.

Learned counsel for the said respondents in opposition raised the two objections of *locus standi* and collateral purpose.

On the *locus standi* issue the contention of the respondent is pivoted on the basis that the petitioner's allegation of legitimate expectation to remain as an advisor and to participate in the management thereof relates to the affairs of Toweltech Berhad who are not parties to the winding-up petition. The reliefs claimed in the petition concern and affect Toweltech Bhd and the shareholders of Toweltech Bhd who are not parties in the winding-up petition. In support of their contention the respondent refers to paras. 9.1, 9.2, 10, 11, 11.5 and 13 of the petition wherein the thrust of the petitioner's complaint is that his removal as advisor and the removal of Koh Pee Seng as director would have a prejudicial effect on his family and Koh Pee Seng's family investments in Toweltech Berhad and consequently their entitlement to have Board representation and having a say in the operations of the Toweltech Bhd to protect their investments. Further the respondent alludes to prayers 1(a)(b); 2(a)(b); 3; 4; and 5 of the petition to support their

- a* contention that the petition herein to wind up DV and DG is seriously flawed and unsustainable as it concerns and seriously affects Toweltech Bhd and its shareholders who are not parties to the proceedings.

- b* On the legal principles applicable the respondent contends that the matters complained of must relate to the rights of the petitioner in his capacity *qua* member of the company and such legitimate expectations and/or understanding alleged must be common between all the shareholders *inter se*. As the petitioner's legitimate expectation to remain as advisor and/or board representative is anchored on the alleged quasi-partnership it cannot form the basis for the petition for the obvious reason that Toweltech is not the subject of winding-up proceedings. In support thereof the respondent relied on several authorities namely *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd* [1996] 1 CLJ 393; *Jaya Medical Consultants Berhad v. Island & Peninsular Bhd* [1994] 1 MLJ 520; *Vergheze Mathai v. Telok Plantation Sdn Bhd* [1988] 3 MLJ 216; *Re H.R. Harmer Ltd* [1958] 2 All ER 689 and *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24. Further the respondent relied on the case of *Kok Fook Sang v. Juta Vila (M) Sdn Bhd* [1997] 2 CLJ 116 and *Yai Yen Hon v. Lim Mong Sam* [1997] 2 CLJ 812 in support of their submission that allegations concerning the affairs in another company not the subject of winding-up are irrelevant.

- e* On the collateral purpose issue the respondent contends that since the reliefs sought are for the benefit of the petitioner's family and that of Koh Pee Seng's family who incidentally are not parties to the action, the collateral purpose of enabling the petitioner whether by himself or with others to wrest corporate control of Toweltech and to cover up the financial irregularities purported in DG becomes evident. The reliefs sought together with the filing of the petition being based on Toweltech's disagreement to repay the loan tantamounts to exerting illegitimate pressure and/or compulsion on Toweltech to repay the loan to the shareholders and hence a collateral purpose and an abuse of the court's process. In support thereof the respondent refers to *Morgan v. 45 Flers Avenue P/L* [1986] 10 ACLR 692; *Apirami Sdn Bhd v. Tamil Nesan (M) Sdn Bhd* [1986] 1 CLJ 493; [1986] CLJ (Rep) 279; *Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 2 MLJ 423.

- g* Having laid out the respective contentions of the parties I shall now address the two issues of *locus standi* and collateral purpose.

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The objection on *locus standi* is based on the premise that the petitioner's complaint relates to another company, namely Toweltech. This objection I must say is without merits. On a close scrutiny of the petition and the evidence as borne from the several affidavits the complaint is not that the petitioner is to be removed as an advisor of Toweltech by actions of Toweltech *per se*. The complaint is that the actions taken by the said respondents in their capacity as directors of DV are oppressive or in disregard of the petitioner's interest as a member of DV or which unfairly discriminates against or is otherwise unfairly prejudicial to the petitioner as a member of DV. The complaints are not based on matters relating to Toweltech as a cause of the complaint. The removal of the petitioner as advisor of Toweltech is only the effect or consequence of the said respondents' conduct – the cause of which arises from a breach of the understanding and legitimate expectations amongst the petitioner and the said respondents as members of DV. Hence, at this juncture it cannot be said that the respondents' conduct at all times does not relate to the affairs of DV and the understanding and agreement amongst them as shareholders.

In approaching the *locus standi* question it is pertinent to be minded that the court has to proceed in accordance with established principles, namely the jurisdiction to uphold a plea of *locus standi* should only be exercised very carefully in circumstances where there is no possibility of doubt and the court is bound to proceed on the basis that everything alleged in the petition and in the documents relied upon by the petitioner is true – see *Tan Guan Eng v. Ng Kweng Hee* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74; *Cheng Hang Gun v. Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352 at 377; *Hayes v. Bristol Plant Hire Ltd* [1957] 1 All ER 685 at 686.

Applying the principles aforesaid to the factual matrix herein, the respondents' objection on *locus standi* must surely fail.

The proposed removal of the petitioner as advisor as contended by the petitioner would be a breach of the understanding and legitimate expectation that the petitioner as a member of DV is entitled to participate in the management of DV's business. In this particular case it is not in dispute that DV's business is the operations of Toweltech of which 40% of its equity is held through DV's wholly owned subsidiary DG. Neither DV nor DG, its wholly owned subsidiary, has any other business. Thus the only practical meaning to the legitimate expectation of participating in the business of DV must be that the petitioner is allowed to participate in the board meetings of Toweltech. The respondents act of excluding the petitioner

- a* from attending the board meetings of Toweltech are acts which goes towards determining the question of breach of the legitimate expectation of the petitioner as a member of DV. The requisition for the EGM of Toweltech and the manner in which DG is to vote the 40% share are actions and conduct of the respondent in their capacity as directors of DG and DV.
- b* The use of the 40% shares to vote for the resolutions to remove the petitioner and Koh Pee Seng are acts of the said respondents as directors of DV and DG. They are not acts of the said respondents as directors of Toweltech. The resolution for DG to vote the 40% shares is effected by the board resolution no. 4 at the board meeting of DV on 9 May 2001 –
- c* see exh. “P13”, p. 92 of the petition. This goes towards the question of breach of the understanding and legitimate expectation of the petitioner that the manner in which the 40% shares are to be voted is to be decided by consensus of the members of DV. The petitioner has in para. 14.5 of the petitioner’s 3rd affidavit affirmed on 4 July 2001 averred that all decisions
- d* until 14 March 2001 (when the proposed removal of the petitioner and Koh Pee Seng was first made) were all made by way of consensus. The said respondents have not denied this averment in any of their affidavits and must therefore to be taken to have admitted this fact;
- e* The various other instances of the complaint being related to the respondent’s conduct as directors/members of DV can be summarised as follows:
1. The issuance of the circular resolution dated 15 February 2001 (exh. “P19”, p. 105 of the petition) to replace petitioner as DV’s corporate
 - f* representative to DG by the 2nd respondent and 3rd respondent without circulating the resolution to the petitioner.
 2. The issuance of the circular resolution dated 10 February 2001 by DG to the 3rd respondent or 4th respondent as representative of DV to
 - g* approve the resolution for the removal of the petitioner at the EGM of Toweltech (exh. “P20”, p. 106 of the petition) without circulating the resolution to the petitioner.
 3. The notice to convene the EGM of Toweltech on 14 March 2001 to
 - h* remove the petitioner and Koh Pee Seng issued by the 3rd respondent as the representative of DG (exh. “P22”, p. 108 of the petition) which is an act by the 3rd respondent in furtherance of the manner in which the said respondents are conducting the affairs of DV and DG;
 - i*

4. The said respondents rejecting the petitioner's proposal to either buy the petitioner's shares or for the said respondents to sell their shares to the petitioner and each of the proposals made by the petitioner at the board meeting on 9 May 2001 are matters relating to the conduct of the said respondents as directors and members of DV affecting the interest of the petitioner as a member of DV

*a**b*

By reason of the above, it cannot be said that the complaints in the petition does not relate to the acts and conduct of the said respondents as directors of DV and DG and hence the petitioner being the shareholder definitely has a standing to file the petition.

c

The legitimate expectation of the petitioner would have no practical commercial meaning if the petitioner is confined to attendance in board meetings of DV or DG but not Toweltech. This is because DV and DG have no other business except the shareholding in Toweltech. All income and expenditure as well as business operations are conducted in Toweltech. In such a situation the court is entitled to consider DV, DG and Toweltech as one entity and to lift the corporate veil in the process. The court would invariably have to look at the business realities of the situation and not confine itself to a narrow legalistic view. The court must look at the economic entity of the whole group and business reality of the situation – see *Tan Guan Eng v. Ng Kweng Hee* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74; *Tengku Abdullah Ibni Sultan Abu Bakar v. Mohamad Latiff bin Shah Mohd* [1997] 2 CLJ 607; *Hotel Jayapuri Berhad v. National Union of Hotel Bar & Restaurant Workers* [1980] 1 MLJ 109.

*d**e*

Though it is trite that a complaint for oppression must refer to acts affecting the person in his capacity as a member nevertheless the principle can be interpreted more broadly. In *H.R. Harmer Ltd* [1958] 3 All ER 689 at 698 in holding that oppression must be *quo* member the judge therein based his decision on the construction of s. 210 of the English Companies Act 1948 which have since been replaced by s. 459 where the words “unfair prejudice” were added. Hence by reason of the rewording in s. 459 (where a broader approach is now taken) the requirement that the oppression must be *quo* member established by *Re H.R. Harmer* must be understood from the context of the restrictive wording appearing under the old s. 210 of the English Companies Act.

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- a* In *Re a company* [1986] BCLC 376 at p. 378 Hoffman J said:
- Counsel for the company submitted the section must be limited to conduct which is unfairly prejudicial to the interest of the members as members. It cannot extend to conduct which is prejudicial to other interest of persons who happen to be members.
- b*
- In principle I accept this proposition, as did Lord Granchester QC in *Re a company* [1983] 2 All ER 36, [1983] Ch. 178. But its application must take into account that the interest of a member is not necessarily limited to his strict legal rights under the constitution of the company. The use of the word ‘unfairly’ in s. 459, like the use of the words “just and equitable” in s. 517(1)(g), enables the court to have regard to wider equitable considerations. As Lord Wilberforce said of the latter words in *Ebrahimi v. Westbourne Galleries* [1972] 2 All ER 492 at 500, [1973] AC 379, they are a recognition of the fact that:
- c*
- ... a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure.
- d*
- Thus in the case of the managing director of a large public company who is also the owner of small holding in the company’s shares, it is easy to see the distinction between his interest as a member. In the case of a small private company in which two or three members have invested their capital by subscribing for shares on the footing that dividends are unlikely but that each will earn his living by working for the company as a director, the distinction may be more elusive. The member’s interest as a member
- e*
- who ventured his capital in the company’s business may include a legitimate expectation that he will continue to be employed as a director and his dismissal from that office and exclusion from management of the company may therefore be unfairly prejudicial to his interest as a member.
- f*
- The learned judge held that the complaint by the petitioner of being dismissed as an employee of the subsidiary affected his interest as a member of the company.
- g*
- The broader approach envisioned by s. 459 of the English Companies Act 1985 is illustrated by the following English cases. In *Re Haden Bill Electrical Ltd.* [1995] 2 BCLC 280 the court held that when considering the capacity in which a petitioner complained for the purposes of s. 459 of the English Companies Act 1985, the court should take a broad view of what might properly be regarded as a petitioner’s interest as a member of the company. That interest was not necessary limited to the member’s strict legal rights under the constitution of the company but, in the case of a small private company in which a member had ventured capital, might include a
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- i*

legitimate expectation that he would continue to participate in the management of the company and be a director unless for some good reason a change in management and control became necessary.

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Peter Gibson J in *Re Ringtower Holdings plc* [1989] 5 BCC 82 at p. 90 set out four points on the wording of s. 459 that has to be noted. The fourth point that he referred is that the relevant interest are interest of members but the court may take into account wider equitable considerations such as any legitimate expectation which a member has which go beyond his legal rights.

b

Earlier *Re Noble & Sons (Clothing) Ltd.* [1983] BCLC 273, the court held that the legitimate expectation included the agreement or understanding that one of the members should participate in all major decisions relating to the company's affairs, even if not in the day to day conduct of its business.

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The authorities cited above clearly demonstrates the broad approach adopted by the English courts which have been prepared to accept wider equitable considerations as legitimate expectations for which a member is recognised to be affected in his capacity as a member. Since the terms of s. 181 of the Companies Act 1965 is wider, the broad approach of the English Courts would be applicable. The Privy Council in *Re Kong Thai Sawmills (Miri) Sdn Bhd* [1978] 2 MLJ 227 has acknowledged that s. 181 of the Companies Act (1965) is wider than the equivalent section in England and hence the broader approach would be applicable here.

*d**e*

I shall now proceed to consider the second objection namely.

The petition was filed for collateral purposes. This objection is based on the allegation that the petition is filed for the purpose of procuring relief for third parties. The objection attempts to equate the petitioner's proposals to appoint his nominees onto the board as being in the interest of the third party nominee. This is in my view is incorrect. It cannot be disputed that the petitioner with 38% of the shares in DV is the single largest shareholder. One of the basis of the petition is that as the single largest shareholder in DV, the petitioner has a legitimate expectation that the voting of the 40% shareholding in Toweltech would be determined by consensus and in any event would not be used against his own interest. The said respondents in using the said 40% shares to vote against the petitioner's interest and his express objections violates this legitimate expectation and hence the said respondents have wrongfully usurped the use of the 40% shares. The relief sought in the petition is to enable the petitioner to revert to the original

*f**g**h**i*

- a* position to have a say in the operations of DV's business, ie, Toweltech, by being able to vote his 36% and his wife's 2.04% shares in DV. It is also to allow him the representation on the board of Toweltech in proportion to his interest. This is to enable him to revert to the understanding at the inception that he is to participate and to have a say in the operations of the business. These proposals were made after the foiled attempt to remove him at the EGM scheduled on 14 March 2001. The proposals are to protect the petitioner's own interest. The persons to be appointed to the board are to represent his interest since the said respondents have in breach of their understanding has not only failed to represent his interest but are taking active action that are against his interests. Hence it follows that the petition is not filed for the collateral purpose of benefiting any third parties as alleged but to secure remedies for wrongs done to the petitioner himself.

- d* In any event the respondent's objections on this point must fail because it involves a question of fact and not of law and hence cannot fall within the ambit of O. 14A. The test as set out in *Malaysian High Court Practice* Volume 1 – para. 14A.1.3 – is whether all the necessary material facts have been duly proved or admitted and postulates that there is no dispute as to the relevant facts at the time the court proceeds to determine the question based entirely on the arguments of law – see also *Federal Insurance Company v. Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390. Since the facts pertaining to the allegations of collateral purposes have not been admitted but disputed by the petitioner, it does not fall within the ambit of O. 14A RHC.

- f* By reason of the aforesaid I accordingly rejected the respondent's preliminary objections and ordered that the hearing of encl. 5 be proceeded upon.

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